

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2004-0018

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY WILLIAM A. WIMSATT REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY JEFFERSON
COUNTY PUBLIC SCHOOLS, DISTRICT R-1 and JEFFERSON COUNTY BOARD OF
EDUCATION**

On or about August 25, 2004, Complainant William A. Wimsatt filed a complaint with the Colorado Secretary of State against Jefferson County Public Schools, District R-1, and Jefferson County Board of Education, alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2004) ("the FCPA"). On August 31, 2004, Complainant resubmitted his complaint to the Secretary of State with additional required information. The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings on September 2, 2004, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter October 6, 2004. William A. Wimsatt ("Wimsatt" or "Complainant") appeared personally and represented himself.¹ Jefferson County School District R-1 and the Jefferson County Board of Education ("the School District") was represented by Allen P. Taggart, Esq. and W. Stuart Stuller, Esq. of Caplan and Earnest LLC. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Article XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2003).

ISSUE PRESENTED

On August 19, 2004, the School District referred two ballot measures, one involving a proposed mill levy override and one involving a proposed bond issue, for determination by eligible electors of the School District at an election on November 2, 2004. The issue to be determined in this proceeding is whether, in connection with those ballot measures, the School District spent public money and/or made contributions to urge persons to vote for

¹ Wimsatt's initial complaint filed with the Secretary of State indicated that he was filing the complaint on behalf of Citizens Against Unnecessary Spending Escapades ("C.A.U.S.E."), an issue committee. At the hearing in this matter, Wimsatt indicated that he is not an attorney and clarified that he was representing only himself at the hearing. He indicated that C.A.U.S.E. was not a party. C.A.U.S.E. did not appear at hearing through counsel or otherwise.

these referred measures, in violation of Article XXVIII of the Colorado Constitution and Section 1-45-117 of the FCPA.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The School District is a political subdivision of the State of Colorado.
2. The School District established two advisory groups in the spring of 2003 to consider the School District's financial condition and to make recommendations concerning the School District's future capital needs and future operating revenue needs.
3. The advisory groups provided recommendation to the District in the fall of 2003. In response to these recommendations, the Board charged the School District's superintendent and staff with informing the public about what was perceived by the Board to be an impending budgetary and financial crisis for the School District.
4. As directed by the School Board, the staff of the District developed a communications strategy to educate and inform the public about the District's financial condition and needs. Starting in January 2004, the District's communications department created a Good New Kit to stress positive developments in the District. In addition, the Communications Department developed a Call to Action plan as one of number of ways of responding to the Board's charge to communicate financial and budgetary concerns to the public. The first part of the Call to Action was a budget alert document that was distributed internally to School District employees. This was followed in late spring 2004 with a budget alert document addressed to the public at large. Initially these documents were created as brochures and subsequently they were incorporated in a Call to Action portion of the School District's website, which was created at the end of April 2004.
5. The brochures that formed the basis for the Call to Action portion of the District's website were principally drafted by District employee Marlene Desmond, communications director for the District, under the direction of Rick Kauffman, the District's executive director of communications. Desmond personally wrote some portions of the brochures and additionally utilized data and other information provided by other District departments. Desmond was also principally responsible for maintaining the Call to Action web pages on the District's website.
6. The Call to Action component of the District's website included an explanation of the District's financial condition and a description of its proposal to raise additional funds through a mill levy override and bond issue, including an explanation of the property tax impact of the proposals, an indication of how the money raised would be spent, and a description of the impact on the District if additional funds were not raised. The Call to Action urged the public to support the District's proposals.

7. The Call to Action portion of the District's website was accessible via several different links on the District's website.

8. At a regular business meeting of the Board of Education held on the evening of August 19, 2004, the District's Board of Education authorized, by resolution, the referral to District electors of two ballot measures to be determined at an election on November 2, 2004: a \$323.8 million bond issue and a \$38.5 million mill levy override. Also at that meeting, the Board approved the ballot title and text for these measures. Subsequently, these measures became designated as ballot measure 3A (the mill levy override) and ballot measure 3B (the bond issue).

9. Prior to the Board of Education's August 19, 2004 vote, the District's communications department discussed the need to remove the Call to Action pages from the District's website in the event the Board voted to authorize the mill levy and bond issue elections, in order to avoid concern on the part of opponents of the measures.

10. On August 20, 2004, the day after the Board of Education referred measures 3A and 3B to the voters, Desmond removed from the District's website all links to the Call to Action web pages so that the public could not access those pages. She also placed HTML (hypertext markup language) code to stop search engines from locating the Call to Action pages. As a result, as of August 20, 2004, it was not possible to access the Call to Action pages through the District's website or through an outside search engine such as Google.

11. After eliminating links within the District's website and inserting code to prevent access to the pages from an outside search engine, Desmond archived the Call to Action pages on the District's server. Desmond's intent in doing so was to preserve the Call to Action material while making it inaccessible to the public.

12. It is not uncommon to archive web page items to a server on a temporary basis prior to placing the items for storage on a hard drive or diskette.

13. Between August 20 and approximately August 25, 2004, individuals who had previously "bookmarked" the District's Call to Action web pages on their computers were able to access the Call to Action pages despite the fact that Desmond had removed links to those pages from the District's website and had inserted code to prevent access to the pages from an outside search engine. This was because the bookmarks allowed individuals to access the pages directly on the District's server where they had been archived.²

² Wimsatt testified that until at least August 24, 2004, he was able to access the District's Call to Action website pages through a link on the District's website entitled "Latest News! Bond Election and Mill Levy." The ALJ finds Wimsatt's testimony in this regard was mistaken. Convincing testimony from the District's witnesses established that this link led only to a short press release announcing the Board of Education's action in authorizing the bond issue and mill levy override elections and did not provide a link to the District's Call to Action web pages. As noted, public access to the Call to Action web pages from August 20 through August

14. When she archived the Call to Action pages on the District's server on August 20, 2004, Desmond did not anticipate that individuals who had previously bookmarked the Call to Action pages would still be able to access them. Desmond learned that this was the case when she was informed by another District employee shortly after August 20, 2004, that Wimsatt had complained the pages were still accessible. In response to this complaint, on or about August 25, 2004, Desmond deleted the Call to Action pages from the District's server. Following this action, the Call to Action pages were no longer accessible to any members of the public, even those who had previously bookmarked the pages.

15. Between August 19, 2004 and August 25, 2004, no School District employee time or District funds were spent maintaining the Call to Action website pages. The only District employee time spent on the website during this period was to delete the pages from the District's website and make them inaccessible to the public.

16. The District's pre-August 19, 2004 Call to Action web pages included a Volunteer Form seeking volunteers interested in becoming part of a grassroots campaign to support a bond and mill levy campaign for the School District. Interested individuals were asked to input their names and other identifying information. The page indicated that information provided on the volunteer form "will be forwarded to the Quality Education Drive committee, which has been formed to organize a community-wide effort to support the bond and mill levy override election." Despite this explanation, the Volunteer Form web page was never actually operational. Although an individual interested in volunteering could enter personal information on the form and then click on the "submit" button, the information so entered never actually generated any data and was in fact lost. Thus, if prospective volunteers actually entered any identifying information on this form, that information was never obtained by either the District or QED.

17. As was true of all the Call to Action web pages, the Volunteer Form was accessible between August 20 and August 25, 2004, to members of the public who had previously bookmarked the pages on their computers. The Volunteer Form continued to be non-operational between August 20 and August 25, 2004, just as it had been previously.

18. Prior to the Board's decision to refer the ballot measures to a vote, a community organization in favor of prospective ballot proposals was formed, known as Quality Education Drive or "QED." A number of District employees volunteered to assist QED in its activities. Among these volunteers were Desmond, Rick Kaufman, Director of the District's Communications Department, and Casey Mahon, the District's Manager of Community Relations.

25, 2004 was limited to individuals who had previously created a Call to Action bookmark on their computers. After approximately August 25, 2004, when the Call to Action pages were deleted from the District's server, these pages were no longer available to the public through any District source.

19. The District did not require or encourage any of its employees to participate in QED, did not expend any public funds in support of QED, and did not make any contributions to QED.

20. In the early part of August 2004, while the Call to Action component of the District's website was still available to the public, Desmond copied the Call to Action portion of the District's website onto her home computer. Desmond accomplished this from her home during non-working hours by accessing the District's publicly-available website on her home computer, navigating with her browser to the Call to Action section of the site, copying the pages using the "save as" feature, and saving the Call to Action pages to her home computer.

21. Desmond's home computer has no connection to the District's server and is not otherwise connected to the District's web pages. Desmond used only publicly-available information and resources to copy the District's Call to Action web pages to her own computer and did not utilize any special expertise, knowledge, or equipment acquired through her District employment to accomplish this task.

22. In the beginning of August 2004, in her capacity as a QED volunteer, Desmond began developing a web site for QED in her spare time from her home computer. Desmond created the new website using the Call to Action pages she had copied to her home computer as a basis for QED's pages. Initially, QED's web pages were very similar to the District's Call to Action pages as those pages had existed in the early part of August 2004. Over time, additions, subtractions and alterations were made to QED's pages so that the QED pages ultimately were somewhat less similar to the District's Call to Action web pages than they had been when they were initially created.

23. Redirection occurs on a website as a result of HTML code. Among other things, redirection code may allow users to transfer from one page to another within a website or may allow the content on one website to be shifted to another website. At no time did the District's website pages, including the Call to Action pages, ever contain a redirection that would direct users of the Call to Action pages to QED's website or would allow the content of the District's website to be shifted to QED's website.

24. QED's website is <http://jeffcoschoolsyes.com>. It is both a web address and a domain. At all times the District's website, <http://jeffco.k12.co.us>, including the Call to Action pages, was completely separate from QED's website and server. The QED website never resided on the District's server.

25. When Desmond initially created the QED website it included a page that urged readers to support the ballot issues in various ways. Among other things, the page noted: "If you would like to have a QED representative speak to your service or school organization, e-mail cmahon@jeffco.k12.co.us." This page paralleled a similar entry in the District's pre-August 20, 2004 Call to Action pages concerning the potential ballot issues, which stated: "If you would like to have a Jeffco Public Schools representative speak to

your service or school organization, e-mail cmahon@jeffco.k12.co.us.” The inclusion of the reference to a District employee in the QED website as a source for speakers was an unintentional error that Desmond quickly corrected. Mahon, the District’s Manager of Community Relations, was never aware that he had been so listed in either the District’s website or QED’s website. He never received any inquiries or requests from the public in connection with either entry.

26. The information contained in the District’s website is not trademarked or protected by copyright. All information on the District’s website is available to the public and may be freely used by the public. The District does prevent the public from utilizing information contained on its website, does not require prior authorization for such use, and does not charge the public for such use.

27. QED did not pay the District for use of the District’s website material.

28. The District’s logo consists of a swoosh combined with the words “Jeffco Public Schools Building Bright Futures.” QED did not use the District’s logo on its website.

29. Following August 19, 2004, the District’s communications department has not advocated for ballot issues 3A or 3B. The District’s communication department does not perform any work for QED.

30. Because the QED web pages were originally very similar in content and format to the District’s Call to Action web pages as they existed up to August 19, 2004, it was possible to confuse QED’s web pages with the District’s Call to Action pages.

31. QED published a set of flyers in support of measures 3A and 3B. The initial version of the flyer contained a reference to the School’s District’s website, <http://jeffco.k12.co.us>. A subsequent version of the flyer attempted to substitute a reference to QED’s website, <http://jeffcoschoolsyes.com>, for the prior reference to the School District’s website.³

32. The QED flyers were paid for by private donations. No public funds from the School District or otherwise were involved in the printing of these flyers.

DISCUSSION

1. The FCPA, in combination with Article XXVIII of the Colorado Constitution, together comprise Colorado’s campaign finance law. These provisions prohibit political subdivisions of the state, such as the School District, from “expend[ing] any public moneys from any source, or mak[ing] any contributions to urge electors to vote in favor or against”

³ The new reference erroneously listed QED’s website as <http://jeffcoschoolyes.com> (omitting the final “s” from “schools”) and thus did not correctly list QED’s actual website.

specified matters, including any “referred measure, as defined in section 1-1-104(34.5).” Section 1-45-117(1)(a)(I)(C), C.R.S. (2004).

2. Section 1-1-104(34.5) defines a referred measure as any ballot question or ballot issue submitted by . . . the governing body of any political subdivision to the eligible electors of the . . . political subdivision pursuant to article 40 or 41 of [title 1]. The School District concedes that ballot measures 3A and 3B are referred measures as defined by Section 1-1-104(34.5). Thus, the School District concedes that it is bound by the prohibitions of Section 1-45-117(a)(I)(C) with respect to measures 3A and 3B.

3. One of the underlying purposes of the FCPA and Article XXVIII is to assure that government does not provide an unfair advantage to one side over the other in the electoral process by utilizing public funds to propagandize in support of a particular candidate or issue. *Mountain States Legal Foundation v. Denver School District*, 459 F. Supp. 357 (D.Colo. 1978). The specific purpose of Section 1-45-117 is to prohibit governmental entities from spending public funds to influence the outcome of campaigns for political office and ballot issues. *Colorado Common Cause v. Coffman*, 85 P.3d 551 (Colo. App. 2003) (opinion modified and as modified, Petition for Rehearing denied May 29, 2003; *cert. granted* March 1, 2004).

4. Complainant asserts that the District’s actions in this matter violated the FCPA’s prohibitions against public contributions or expenditures to urge voters to vote for or against ballot measures. Specifically, Wimsatt contends that through the methodical transfer to QED of the District’s publicly paid for website work product, the District made an expenditure or contribution to QED, thereby urging electors to vote in favor or against ballot measures 3A and 3B. The ALJ disagrees that any FCPA violation occurred.

a. Expenditures and Contributions Before August 19, 2004. The FCPA prohibits public expenditures or contributions to urge the public to vote for or against certain “referred measures.” In this case, ballot measures 3A and 3B did not become referred measures until these matters were actually submitted to the voters. Such submission did not occur until the Board of Education passed resolutions on August 19, 2004, authorizing ballot questions regarding a \$38.5 million mill levy override (measure 3A) and a \$323.8 million bond (measure 3B) to be placed before District electors at an election on November 2, 2004. Section 1-1-104(34.5), C.R.S. (2004).

Because the prohibitions of Section 1-45-117(a)(I)(C) are limited to referred measures, any contributions or expenditures by the District that occurred prior to the August 19, 2004 referral date are not covered by the FCPA. In this case, the School District initiated the Call to Action campaign in the fall of 2003, communicating to District employees and the public through brochures and other means. In April 2004, approximately four months before measures 3A and 3B were submitted to the District’s electors, the District created a Call to Action component to its publicly-available website and included the Call to Action brochures as part of the content of that website component. As indicated from the content of these communications, one purpose of the Call to Action

program was to communicate the District's financial status to the District's constituents. Additionally, the program attempted to garner support for an anticipated mill levy override and a bond issue. Moreover, District employees created these communications in the scope of their District employment. Thus, it is undisputed that public funds were utilized to create the Call to Action campaign and the Call to Action website, both of which were used by the District to urge voters to support the anticipated mill levy override and bond issue. However, because no referred measure, as defined by Section 1-45-117(a)(I)(C), existed at the time these expenditures were made, such expenditures were not prohibited by the FCPA.⁴

b. Expenditures and Contributions After August 19, 2004. Section 1-45-117(a)(I)(C) does cover District actions after August 19, 2004, the date 3A and 3B became referred measures. Thus, after August 19, 2004, the District was prohibited from expending any public funds or making any contributions to urge electors to vote for or against ballot measures 3A and 3B. The evidence failed to establish the District expended any public funds or made any contributions in contravention of this prohibition.

(1). Wimsatt maintains that the transfer of material from the District's publicly-funded Call to Action website to QED, an organization supporting measures 3A and 3B, constituted a public expenditure or contribution. Wimsatt points to the fact that the employees of the District who created the Call to Action materials were also volunteers for QED and were the individuals who actually effectuated the transfer of the materials to a newly-created QED website. This argument is unconvincing.

As pertinent here, the definitions of "contribution" and "expenditure" applicable to Section 1-45-117 are found in Article XXVIII. Article XXVIII, Section 2(5)(a)(I) defines a contribution as "[t]he payment, loan, pledge, gift, or advance of money" Section 2(5)(a)(III) of Article XXVIII defines a contribution as "[t]he fair market value of any gift or loan of property. . . ." A contribution does not include services provided without compensation by volunteers. Article XXVIII, Section 2(5)(b). Pursuant to Section 2(8)(a) of Article XXVIII, an expenditure means "any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of . . . supporting or opposing a ballot issue or ballot question."

In this case, the evidence established that a District employee, Marlene Desmond, copied the Call to Action component of the District's website onto her personal computer during non-work hours. She did so while the Call to Action pages were still available to the public (before measures 3A and 3B were submitted to the electorate by the District's Board), from her own home, and without the use of any special equipment, expertise, or knowledge available only to District employees, simply by clicking on the "save as" function on her computer. After copying the Call to Action pages onto her own computer, Desmond

⁴ Wimsatt does not, in fact, appear to argue the District's pre-August 19, 2004 Call to Action expenditures constituted a direct violation of the FCPA.

proceeded, on a volunteer basis and not during working hours, to create a website for QED, using the Call to Action materials as a substantial component of QED's new website.

Under the facts of this case, no contribution or expenditure was made by the District. No contribution was made pursuant to Section 2(5)(a)(I) of Article XXVIII because the District did not pay any money to QED. In addition, the District did not make a gift or loan of any property to QED pursuant to Section 2(5)(b) of Article XXVIII. Once posted, the material on the District's website, including the Call to Action component of that site, was public property, available for use by anyone without charge and without prior authorization. Because the website content was freely available to all, the District did not "own" the content once it was placed on the website and thus could not provide that content specifically to QED as a gift or as a loan. Additionally, because the website content was available to the public without charge it did not have a "fair market value." Thus, the District did not make a "contribution" in this matter. Furthermore, the transfer of website content in this matter did not constitute an expenditure pursuant to Section 2(8)(a) of Article XXVIII because no transfer or gift of money occurred.

(2). Complainant implies that because the Call to Action website materials were available to the public after August 19, 2004, a violation of the FCPA occurred. The ALJ is unpersuaded.

The evidence established that the District attempted to render the Call to Action web pages inaccessible to the public as soon as measures 3A and 3B were referred to the District's voters on August 19, 2004. As of August 20, 2004, this effort was largely, but not entirely, successful. On August 25, 2004, as soon as District personnel learned that public access to the Call to Action materials was still available through the District's server to individuals who had previously bookmarked the Call to Action site on their computers, the District took immediate and successful action to prevent further public access to those materials by removing those materials from the District's server. Further, the evidence established the District expended no public funds after August 19, 2004 to maintain the Call to Action component of its website. The only public funds spent on the Call to Action materials after that date were expended to dismantle the site. Under these circumstances, the evidence failed to establish the District expended any public moneys or made any contributions to urge electors to vote in favor or against referred measures 3A and 3B in connection with the limited availability to the public after August 19, 2004 on the District's website of the Call to Action materials.

5. Complainant also asserted a contribution or expenditure occurred here because the District's server hosted QED's website, the District's website redirected individuals to QED's website or actually redirected the content of the District's Call to Action pages to the QED website, and the QED website could not have been created using the materials from the District's Call to Action website component without expertise, equipment, and knowledge gained by someone in the employ of the District. The evidence established none of these factual assertions was accurate. Thus, a contribution or expenditure cannot be established on the basis of these claims.

6. Wimsatt additionally contends that because QED's website initially was so similar to the District's Call to Action materials, public confusion was created with respect to which entity was responsible for creating and maintaining QED website. Wimsatt asserts the consequence of such similarity and resulting confusion is an FCPA violation. The ALJ disagrees.

The issue in this case is not whether the public may have been confused by the similar appearance of the two websites but whether the District made an improper contribution or expenditure, as proscribed by the FCPA. No such contribution or expenditure has been established here. The fact that the Call to Action pages and the QED web pages were alike and created public confusion is not an issue addressed by the FCPA.

7. Complainant asserts that QED was essentially a "straw man" organization, made up of District employees who originally created the Call to Action web pages and who then used those web pages for the benefit of an organization supporting the passage of measures 3A and 3B. He contends that because QED was able to use the District-created Call to Action materials in support of its campaign favoring measures 3A and 3B, QED had an unfair advantage over opponents of the measures. Wimsatt argues that because it had access to these materials and had a ready-made website, QED had immediate access to all the materials it needed to support its position. According to Wimsatt, QED was thus able to go into "full campaign mode" as soon as the measures were referred, in contrast to opponents of the measures who had to generate campaign materials from scratch.

In light of the facts in this case, Wimsatt's arguments in this regard do not convincingly establish a violation of the FCPA. As noted above, the District was not prohibited by the FCPA from communicating with the public about its financial situation. Nor was the District prohibited, prior to August 19, 2004, from attempting to gather support for additional school financing measures. The District attempted to accomplish these goals beginning in the fall of 2002 and continuing through the spring of 2003, in part through the establishment of the Call to Action component of its website. Thus, the evidence established that the Call to Action website materials were developed for the legitimate purpose of communicating with the District's constituency concerning the District's financial situation and concerns. There is no evidence these materials were developed by the District for the purpose of benefiting QED.

Additionally, no District funds were expended or contributed to QED in connection with the transfer of District website content to QED's website. The transfer was accomplished on a volunteer basis by a District employee in her spare time and without the use of any special expertise, knowledge, or equipment available only to District employees. Nothing in the FCPA prohibits such volunteer actions on the part of District employees. Further, the materials that were transferred were freely available to the public. Under these circumstances no FCPA violation occurred.

8. Complainant implies that inclusion in the initial QED flyer of the District's website address and inclusion of Casey Mahon's e-mail address in the QED website

violated the FCPA. The ALJ disagrees. The evidence established the District did not expend any moneys or make any contributions toward the production of the QED flyers or the QED website. Further, with respect to the inclusion of Mahon's e-mail address, the evidence established Mahon was unaware this reference had been included in the website. Additionally, he never had any inquiries in response to the website entry. Consequently, no violation of the FCPA has been established.

9. In sum, the ALJ concludes Complainant has failed to meet his burden of establishing a violation of Section 1-45-117, C.R.S. (2004) of the FCPA, as alleged in the complaint, or a violation of Article XXVIII of the Colorado Constitution.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over the complaint in this matter. Article XXVIII, Section (9)(2)(a).

2. In connection with ballot measures 3A and 3B, the School District did not expend public moneys or made contributions to urge persons to vote for or against these referred measures. Thus, no violation of Article XXVIII of the Colorado Constitution or Section 1-45-117 of the FCPA has been established.

AGENCY DECISION

Because Complainant has failed to establish that the School District violated Article XXVIII of the Colorado Constitution or Section 1-45-117 of the FCPA in connection with ballot measures 3A and 3B, the Complaint in this matter is dismissed.

DONE AND SIGNED
October ____, 2004

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

Bill Wimsatt
16 Blue Sage
Littleton, CO 80127

Allen P. Taggart
W. Stuart Stuller
Caplan and Earnest LLC
1800 Broadway, Suite 200
Boulder, CO 80203

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1560 Broadway, Suite 200
Denver, CO 80202

on this ____ day of October, 2004.

Secretary to Administrative Law Judge

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